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In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS EL-BANNA ET AL.

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INTRODUCTION

The Government's brief builds its case in an unreal universe. In that universe, the Government has established a fair and perfect system of detentions "designed to track the requirements for due process deemed sufficient for American citizens in *Hamdi v. Rumsfeld*" and "to strike an appropriate balance" between liberty and security, thereby granting the Guantanamo detainees "more procedural protections than any other captured enemy combatants in the history of warfare."[1] Nothing in this tale remotely resembles the actual facts before the Court.

The Government says its CSRT procedures provided petitioners "an opportunity to testify, call reasonably available witnesses, and present relevant and reasonably available evidence."[2] It neglects to mention that the CSRTs denied every request by a detainee for a witness who was not already at Guantanamo, three-quarters of the requests for witnesses who were there, and the great majority of the requests to present other evidence.[3]

The Government says the CSRT procedures allowed detainees "to question those witnesses called by the Tribunal."[4] It neglects to mention that

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[1] Brief for the Respondents ("Gov. Br.") at 9-12.

[2] *Id.* at 3.

[3] *See* Mark Denbeaux *et al.*, Seton Hall University School of Law, *No Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* at 2-3, 28-31 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf ("Denbeaux Report").

[4] Gov. Br. at 49.

detainees were never in fact given the opportunity to question witnesses called by the tribunals, because the tribunals never called witnesses. Thus, no detainee ever had an opportunity to confront his accuser.[5]

The Government says that CSRT panel members were not only neutral, but had been ordered to be "neutral" by their superiors in the Department of Defense.[6] It neglects to mention that the panel members were not given the institutional protections of independence afforded to members of courts-martial and military commissions.[7] No mention is made of the undisputed fact that superiors in the Department of Defense, while purportedly ordering the CSRT panels to be neutral, also were ordering CSRTs to be done over when they reached a conclusion that a detainee was not an enemy combatant. No mention is made of the declaration by Colonel Abraham disclosing that the information supporting the determinations that detainees were enemy combatants was unreliable, and that the panels were under constant pressure from superiors to confirm the military's pre-announced determinations that detainees were enemy combatants.[8]

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[5] Denbeaux Report at 21.

[6] Gov. Br. at 57.

[7] *See, e.g.*, 10 U.S.C. § 837 (prohibiting command influence on court-martial judges); 10 U.S.C. § 949b (prohibiting command influence on military commission judges).

[8] Since petitioners' brief was filed, another declaration has been submitted in another case corroborating Colonel

The Government quotes the CSRT procedures saying that a "detainee may not be forced to testify."[9] But it later acknowledges that a detainee, even if not forced to testify before the CSRT, could be imprisoned indefinitely on the basis of statements extracted from him or others through coercion, so long as the CSRT panels considered the coerced statements "relevant and helpful."[10]

And the Government says the detainees were given notice – "notice of the *unclassified* factual basis" for their detention.[11] At the same time, the Government now acknowledges that "most of the CSRT conclusions are based in significant part on

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Abraham's revelations. Declaration of William J. Teesdale, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. Oct. 4, 2007).

[9] Gov. Br. at 51.

[10] *Id.* at 58. As pointed out in petitioners' opening brief, under the CSRT procedures that were applied to these petitioners, CSRT panels were not even required to attempt to determine whether the evidence used to support an enemy-combatant determination was derived from torture or coercion. In that regard, the Government misleads the Court when it says the petitioner had the benefit of "procedures authorized by Congress." Gov. Br. at 9, 43. Every petitioner's CSRT was conducted between September and December 2004, more than a year *before* the DTA was enacted on December 30, 2005. *See* App. 73. Those CSRTs were conducted pursuant to procedures created unilaterally by the Department of Defense as a matter of internal Department "management" and announced by Deputy Secretary Paul Wolfowitz on July 7, 2004. App. 141-46. Congress had no involvement in developing the procedures employed in petitioners' CSRTs. Indeed, when Congress enacted the DTA it found those CSRT procedures defective, and it required changes for *future* CSRTs. DTA §§ 1005(a)(2) & (b).

[11] Gov. Br. at 3 (emphasis added).

classified information" – that is, on information which the detainees were never allowed to know and so could not rebut or explain.[12] This acknowledgement alone suffices to reveal the fiction of the whole facade of fair procedure. No amount or form of process can enable an accused to respond to unknown accusations.

The standards set forth by the plurality in *Hamdi* for challenging an enemy-combatant determination are basic and straightforward: the detainee "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). The hearings afforded these petitioners and the other detainees at Guantanamo – put in place just nine days after the Court announced its decision in *Hamdi* – met none of those requirements. Petitioners have never had the opportunity to confront and rebut the accusations against them, and the appellate review to which they are limited under the Detainee Treatment Act ("DTA") would deprive them of that opportunity forever. That is the reality. The facts do matter.

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[12] *Id.* at 4 (emphasis added).

I. PETITIONERS' RIGHT TO HABEAS CORPUS, RECOGNIZED BY THIS COURT IN *RASUL*, IS PROTECTED BY THE SUSPENSION CLAUSE.

A. The Suspension Clause Protects Petitioners' Statutory Right to Habeas Corpus.

The Government contends that this Court's decision in *Rasul*[13] that petitioners at Guantanamo have the right to petition for the writ of habeas corpus was based only on Section 2241 of the habeas statute. Even if that were all *Rasul* relied on, it would be enough.

The Court in *Rasul* was interpreting the scope of a statute that has remained virtually unchanged since the beginning of our Republic. As the Court has recognized, Section 2241 "descends directly" from the language of Section 14 of the Judiciary Act of 1789. *INS v. St. Cyr*, 533 U.S. 289, 305 n.25 (2001). The language of Section 2241 of the habeas statute that was interpreted by this Court in *Rasul* is the same in all material respects as the language of Section 14 of the original Judiciary Act, extending habeas to all "prisoners" who are "in custody, under or by colour of the authority of the United States."[14] That language does not restrict the privilege of the writ to citizens, or make any distinction between citizens and aliens.

This Court's decision in *Rasul* that petitioners at Guantanamo are entitled to petition for the writ under Section 2241 is necessarily a decision that

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[13] *Rasul v. Bush*, 544 U.S. 466 (2004).

[14] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (the "Judiciary Act").

they would have been entitled to petition for the writ under Section 14 of the 1789 Act. Petitioners' right to the writ, therefore, does not result from some recent expansion of the habeas statute. Rather, it falls within the "historical core" of the writ "as a means of reviewing the legality of Executive detention" and would have been available to petitioners since "the formative years of our Government." *St. Cyr*, 533 U.S. at 301.

Petitioners' right to the writ is therefore protected by the Suspension Clause. Section 14 of the Judiciary Act has long been considered a reflection of what the Framers intended to protect through the Suspension Clause. Because the Judiciary Act was enacted by many of the constitutional framers, it has been characterized as "a contemporaneous exposition of the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821); *see, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (The Judiciary Act "was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity . . . "); *Capital Traction Co. v. Hof*, 174 U.S. 1, 9-10 (1899) ("The judiciary act of September 24, 1789, c. 20, drawn by Senator (afterwards Chief Justice) Ellsworth, and passed – within six months after the organization of the government under the constitution, and on the day

before the first ten amendments were proposed to the legislatures of the states – by the first congress, in which were many eminent men who had been members of the convention which formed the constitution, has always been considered as a contemporaneous exposition of the highest authority."); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) ("That act [the Judiciary Act], which has continued in force ever since . . . was passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.").

In summary, the statutory right to habeas corpus to which this Court found petitioners entitled in *Rasul* arises directly from Section 14 of the Judiciary Act of 1789. It is the right to habeas corpus contemplated by the Constitution and is protected by the Suspension Clause.

B. As *Rasul* Holds, the Common Law Writ Would Have Extended to Petitioners Detained at Guantanamo.

The Government spends numerous pages of its brief arguing that habeas at common law did not extend outside the sovereign territory of the crown. In not a single one of the cases the Government cites, however, did the availability of habeas turn on the existence of formal sovereignty over a territory. Whether or not a territory was within the crown's sovereignty was never the issue. As this Court found in *Rasul*, the issue was whether the sovereign

exercised control over the place where the writ sought would run.[15]

There is no doubt of that here. The United States exercises exclusive custodial control over the petitioners, and it exercises complete jurisdiction and

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[15] The scope of the writ at common law, as under the federal habeas statute, is all inclusive, applying to any prisoner in government custody. The Government has cited neither a case nor a statute limiting that scope and restricting the reach of habeas to sovereign territories. As the Court in *Rasul* pointed out, the cases made clear that availability of the writ turned not on formal sovereignty but rather on power and control. The statutory treatment of habeas also indicates that the writ reached beyond sovereign territory. For example, the British Suspension Act of 1777 (which was extended five times until 1783) suspended habeas corpus during the American Revolution explicitly and exclusively for prisoners captured "out of the realm" or "on the High Seas." This suspension makes sense only if one assumes that the writ was otherwise available to persons taken outside the realm, including on the high seas where many sailors had been illegally impressed only to be released on habeas corpus. 17 Geo. 3., c.9; 18 Geo. 3, c.1; 19 Geo. 3, c.1; 20 Geo. 3, c.5; 21 Geo. 3, c.2; 22 Geo. 3, c.1 (end date Jan. 1, 1783).

The Government contends that the passage of statutes by Congress granting habeas jurisdiction for inhabitants of the newly acquired Northwest Territories, Louisiana and Florida, indicates that they would not otherwise have been entitled to habeas at common law. Gov. Br. at 18 n.5. But, if that were so, then the enactment by Congress of Section 14 of the First Judiciary Act of 1789, conferring the right of habeas corpus on prisoners in U.S. custody, would indicate that even citizens within the continental United States also would not have been entitled to habeas corpus at common law. The enactments indicate not that the writ was unavailable at common law, but only that "the power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807).

control over Guantanamo. Because it does so, this Court found in *Rasul* that Guantanamo is not "extraterritorial," but is within the "territorial jurisdiction" of the United States.[16] The writ would have extended to petitioners there at common law.

To hold otherwise and restrict the reach of the writ to areas of formal sovereignty – something decided by the political branches, divorced from actual control over a territory – would enable the political branches to insulate their actions from judicial scrutiny and to deprive persons of their liberty without sufficient cause.[17] That would be antithetical to the "historical core [function of] the writ of habeas corpus . . . as a means of reviewing the legality of Executive detention." *St. Cyr*, 533 U.S. at 301, *quoted in Rasul*, 542 U.S. at 474.

The Government praises an inflexible rule turning on formal sovereignty as "more easily administrable," but that is a disingenuous[18]

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[16] *Rasul*, 542 U.S. at 480.

[17] The Government asserts that formal sovereignty is something decided solely by the political branches of government. Gov. Br. at 35-36. The Framers, however, designed the Suspension Clause as a limitation on the power of the political branches. The Government's theory would enable the political branches to avoid that constitutional limit; by declining to accept formal sovereignty over an area, the political branches could effectively suspend the writ of habeas corpus in the area without meeting the requirements of the Suspension Clause.

[18] The modern-day notion of sovereignty in U.S. domestic and international law bears no relationship to the complex British conception of sovereignty which the Government itself argues (Gov. Br. at 27-32) measured the reach of common law habeas. *See generally* Halliday & White, *The Suspension*

euphemism for a rule allowing the Executive to move the line of habeas jurisdiction around to suit its pleasure. What would make the rule "easily administrable" would also make it the perfect tool for manipulation and injustice, giving officials *carte blanche* to step across the line to avoid the law. The whole purpose of the writ at common law was to prevent the Government from doing just that.

Indeed, as the Government points out in its brief, the Habeas Corpus Act of 1679 was enacted in England in response to abuses by the Earl of Clarendon who was impeached for sending persons "to be imprisoned . . . in remote islands . . . thereby to prevent them from the benefit of the law."[19] It is extraordinary that the Government cites this statute as justification for doing exactly the same thing as the Earl of Clarendon – sending persons to "remote islands . . . thereby to prevent them from the benefit of the law." Its attempt to do so is contrary to the purpose of the writ and to the rule of law it was designed to protect.

Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. (forthcoming May 2008), *available at* http://law.bepress.com/uvalwps/uva_publiclaw/art72. Halliday and White also demonstrate that the Government's view of the reach of the common-law writ is wrong.

[19] Gov. Br. at 29.

C. Habeas Has Always Been Available to Test Whether Persons in Military Custody Are Who the Military Says They Are.

The Government asserts that habeas was unavailable at common law to aliens detained as enemy combatants. That assertion is wrong; it confuses two separate issues.

Prisoners whom the military has lawful authority to detain during war time – whether alien enemies or prisoners of war – do not normally have the right to release through habeas corpus. But whether, as a factual matter, any individual petitioner for the writ is an alien enemy or prisoner of war – whether, *in fact*, he or she comes within the category of persons who may be detained – is a question that always could be examined through habeas. That was so both under the common law and throughout our history.

The Government cites the *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), and *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1959), to support its argument that habeas was not available to persons detained as prisoners of war. Those cases demonstrate just the opposite. In both cases, the Court *exercised* habeas jurisdiction to examine the facts and, after doing so, denied relief *on the merits* because the facts showed that the petitioners were prisoners of war who could lawfully be detained during a war and were therefore not entitled to release.

The federal courts have likewise always exercised habeas jurisdiction to examine the facts and the legal authority offered to support military custody over a

petitioner.[20] For example, although the Alien Enemies Act of 1798 gives the President unreviewable discretion to decide whether to detain or deport alien enemies, the courts have always exercised jurisdiction to determine whether a petitioner is in fact an alien enemy. *See Ludecke v. Watkins*, 335 U.S. 160, 171 n.17 (1948) ("[W]hether the person restrained is in fact an alien enemy . . . may also be reviewed by the courts.").[21]

Indeed, this Court long ago rejected the argument the Government makes here. In *Ex parte Milligan*, 71 U.S. 2 (1866), the Government claimed that the petitioner had conspired against the United States and aided the enemy. It argued that it had unreviewable authority to detain someone as a prisoner of war, and that Milligan was "excluded from the privileges of the [habeas] statute" because he was a prisoner of war.[22] This Court rejected that argument, fully considered the facts regarding Milligan's status and the military's authority to hold him as a prisoner of war and, concluding he was not, ordered his release.[23]

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[20] *See infra* notes 52-53, at 26-27.

[21] *See, e.g., Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946) ("[w]hether the individual involved is or is not an alien enemy, is admitted by the Attorney General to be open to judicial determination"); *United States ex rel. Hack v. Clark*, 159 F.2d 552, 554 (7th Cir. 1947); *Minotto v. Bradley*, 252 F. 600, 602 (D. Ill. 1918); *Ex parte Fronklin*, 253 F. 984, 984 (D. Miss. 1918).

[22] 71 U.S. at 6, 131.

[23] *Id.* at 107, 131.

Nevertheless, for the past six years the Government has argued that it has the unreviewable authority to apprehend anyone anywhere in the world and to detain that person indefinitely simply by applying the label "enemy combatant." That assertion is at odds not only with the common law and the historic precedents of our nation, but also with the Court's decisions three and a half years ago in *Rasul* and *Hamdi*. In both cases, the Court rejected the contention that it should simply defer to the Government's determination of whom it could detain, and confirmed the detainees' right to obtain determinations of the legality of their detentions. As the plurality stated in *Hamdi*, "the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government." 542 U.S. at 535-36.

D. Neither the Text Nor the History of the Suspension Clause Indicates That It Applies Only Domestically.

The Government argues that the circumstances justifying a suspension of the writ of habeas corpus are purely domestic, so the scope of the writ must also be purely domestic.[24] But that argument is a non sequitur. Even if "rebellion" and "invasion" are purely domestic – and that is far from clear – it does not follow that the scope of the writ is domestic. The

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[24] Gov. Br. at 15-18.

conditions justifying the suspension power do not define the underlying reach of the writ.[25]

The necessary consequences of the Government's argument show its speciousness. The argument would set a continental boundary to the protection of the Suspension Clause without regard to the citizenship of the habeas petitioner, thereby allowing Congress to deny a habeas forum to individuals in the position of the U.S. petitioners in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Reid v. Covert*, 354 U.S. 1 (1957). But the Government itself quietly shuns this result and limits its claim to the proposition that "aliens outside the sovereign territory of the United States . . . do not fall within the ambit of the Suspension Clause."[26] Its silence regarding the logical upshot of this argument is thunderous.

The Government also argues that the Constitution never contemplated that the courts would intrude on the President's authority to detain persons in wartime, and that doing so would unconstitutionally restrain the executive and legislative authority in providing for the national defense.[27] These are essentially the same arguments the Government made to this Court four years ago

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[25] The conditions justifying suspension of the writ are those that have the greatest chance of impinging on the ability of the U.S. courts to function, and may well normally be domestic. On the other hand, the purpose of the writ is to relieve individuals from erroneous detention, and the writ reaches to all areas within the sovereign's control.

[26] Gov. Br. at 14; *see also id.* at 18-22, 26 n.8.

[27] *See* Gov. Br. at 16-18.

and the Court rejected.[28] As the Court recognized in *Rasul*, the petitioners seek judicial review only of their claims that they are innocent civilians detained by mistake, and *Rasul* held that they are entitled to such review. It "recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace."[29]

The Court made the same point in *Hamdi*, stating that "unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role . . . serving as an important judicial check on the Executive's discretion in the realm of detentions."[30] As the Court stated:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war . . . it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[31]

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[28] *See* Brief for the Respondents at 42-43, *Rasul v. Bush* and *Al Odah v. United States*, Nos. 03-334 and 03-343 (U.S. Mar. 3, 2004).

[29] *Rasul*, 542 U.S. at 474.

[30] *Hamdi*, 542 U.S. at 536.

[31] *Id.* at 535. As Justice Scalia explained: "Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war

E. The Government Cannot Rely on *Eisentrager* to Escape the Law.

The Government contends that *Eisentrager* established that aliens outside U.S. sovereign territory are not protected by the Constitution and that the Government was entitled to rely on that "longstanding constitutional rule" in designing its detention policies.[32] The Government is wrong on both counts.

Eisentrager[33] did not establish a blanket exemption from the Constitution for the Government in dealing with aliens outside U.S. sovereign territory. The Court held in that case that admitted alien enemies who had been charged, tried and convicted of violating the laws of war by a duly authorized military commission, and who at no time had been within the territorial jurisdiction of the United States, were not entitled to challenge their convictions in the federal courts through the writ of habeas corpus.[34] That decision provides no

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and, in a manner that accords with democratic principles, to accommodate it." *Id.* at 579 (Scalia, J., dissenting).

[32] Gov. Br. at 10; *see also id.* at 18-20, 22-24.

[33] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[34] *See Rasul*, 542 U.S. at 475-76; *see also id.* at 487-88 (Kennedy, J., concurring). Unlike petitioners here, the petitioners in *Eisentrager* did not allege that they were innocent or that they had been deprived of a fair trial by the military commission that convicted them. Their constitutional claim was that, under Articles I and III and the Fifth Amendment, the military commission lacked jurisdiction to try them. This Court rejected that claim. *See Eisentrager*, 339 U.S. at 785. Because the *Eisentrager* petitioners did not challenge the fairness of the trial they had received, *Eisentrager* had no

authorization for the Government to ignore the Constitution in its dealings with aliens abroad. Indeed, what the Government is claiming – in effect, that it relied on *Eisentrager* to create a law-free zone in Guantanamo where it could disregard the Constitution, laws, and treaties of the United States – is offensive to the rule of law. The Government "may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). It can never have a valid reliance interest to act beyond the law.

However the Government may have viewed *Eisentrager* before *Rasul* was decided, it simply is impossible to view that decision after *Rasul* as granting the Government broad authority to ignore the Constitution and U.S. law at Guantanamo. *Rasul* made clear that the Guantanamo petitioners "differ from the *Eisentrager* detainees in important respects" which the Court described as "critical" to the "question of the prisoners' *constitutional* entitlement to habeas corpus."[35] It also found that, unlike China where the *Eisentrager* petitioners were tried and the prison in Germany where they were confined, Guantanamo is not "extraterritorial," but is within the "territorial jurisdiction" of the United States.[36]

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occasion to address whether the protections of the Due Process Clause applied to them.

[35] *Rasul*, 542 U.S. at 476.

[36] *Id.* at 480.

II. THE DTA DOES NOT PROVIDE AN ADEQUATE SUBSTITUTE FOR HABEAS.

A. The Government Deprived Petitioners of an Essential Protection at the Onset of Their Captivity and Has Denied Them a Meaningful Process Since.

The Government argues that the process it has provided the detainees should be considered sufficient because it was modeled after Army Regulation 190-8, which it says the plurality in *Hamdi* suggested would be adequate for testing the detention of an American citizen as an enemy combatant.[37] But the Government makes the wrong comparison. The question is not whether the procedures it implemented are comparable to the Regulation 190-8 procedures, but whether they are equivalent to the habeas review to which these petitioners are entitled to test the legality of their detentions. *See Swain v. Pressley*, 430 U.S. 372, 381, 384 (1977).

The plurality in *Hamdi* did indicate that there was a "*possibility* that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."[38] To be sufficient, however, the procedures applied by any such tribunal must meet the core "standards" the Court "articulated" in *Hamdi* – that is, they must provide a detainee with "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual

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[37] Gov. Br. at 52.

[38] *Hamdi*, 542 U.S. at 538 (emphasis added).

assertions before a neutral decisionmaker."[39] As pointed out in detail in petitioners' opening brief, neither the CSRT process nor the limited review allowed under the DTA meets those standards.[40] Significantly, the Government makes no serious attempt to establish that they do.

The 190-8 hearings are simply not comparable.[41] They are held promptly in the field after capture whenever there is any doubt about a prisoner's status. They work precisely because they are held close to the time and place of capture. Witnesses with knowledge of the circumstances surrounding the capture are available then and there; they are not available months or years later, thousands of miles away in a place like Guantanamo. Moreover, the military panels reviewing the captures promptly in the field as part of 190-8 hearings are not prejudiced by decisions already made about a detainee's status by superiors in the chain of command. Command influence is not an issue because people at the top have not prejudged the result.

The Government simply disregarded Army Regulation 190-8 for the people it shipped to Guantanamo.[42] By doing so, it denied petitioners a

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[39] *Id.* at 533.

[40] Brief for Petitioners *El Banna et al.* at 13, 26-49.

[41] *See* Brief Amicus Curiae of Retired Military Officers in Support of Petitioners at 9-13 (U.S. Aug. 24, 2007) (discussing the "fundamental differences between CSRTs and hearings under Regulation 190-8").

[42] Reportedly, the military wanted to hold those hearings and officials in the White House vetoed them. Jane Mayer, *The*

critical procedural protection at the outset when it could have been effective to prevent their erroneous detentions.[43]

As the plurality in *Hamdi* emphasized, "[i]t is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"[44]

Hidden Power, THE NEW YORKER, July 3, 2006, at 53. Instead, as an interrogator at the Kandahar Air Base in early 2002 has explained, "every Arab we encountered was in for a long-term stay and an eventual trip to Cuba." *See* Chris Mackey and Greg Miller, *The Interrogators* 85 (2004).

[43] Army Regulation 190-8 and its predecessors have played a critical role as the nature of warfare has changed. Through the Korean Conflict, there was normally little difficulty identifying one's enemies; they wore uniforms. Beginning with the Vietnam War, however, it became more difficult. Many of the enemy dressed like civilians and, as a result, identification became difficult and the danger of mistakes became greater. Army Regulation 190-8 and its predecessors, requiring hearings to be held promptly in the field whenever there is any doubt about a prisoner's status, are critical for dealing with that problem. The military's adherence to those regulations in every conflict since Vietnam (until the conflict in Afghanistan) is probably a primary reason why habeas cases have not been filed on behalf of persons detained in those other conflicts. Had the Government complied with its regulations and held those hearings here, it is likely that many of the petitioners would have been released soon after their initial detentions and never shipped to Guantanamo, and that many of these cases would never have been filed. Of course, the 190-8 hearings were never designed for reviewing the status of persons taken into custody thousands of miles from any battlefield, in places like Bosnia and the Gambia, to be held indefinitely in a conflict without end.

[44] *Hamdi*, 542 U.S. at 533 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)).

What is required at the onset of a detention, and what works then, is not what is required and works years later and thousands of miles away.

B. Petitioners Are Not Required to Exhaust the Inadequate DTA Remedy.

The Government argues that it is premature for this Court to decide whether the DTA provides an adequate substitute for habeas before the petitioners have exhausted the DTA process in the Court of Appeals.[45] The Government may be correct that "the exact nature of DTA review remains uncertain."[46] After all, almost two years after that statute went into effect, not a single hearing on the merits has yet been held in any of the cases filed under the DTA. One thing is certain, however: the DTA review process is not commensurate with habeas and is inadequate.

Petitioners pointed out the inadequacies of the DTA process in detail in their opening brief.[47] Most importantly, the DTA process provides limited appellate review of a record that is both replete with evidence obtained through torture and coercion and that, at the same time, is inherently incomplete because it was developed under a process that deprived the detainees of counsel and of the opportunity to confront the allegations against them and to present evidence of their innocence. Rather than correct the inadequacies of the underlying CSRT process, the limited DTA review perpetuates

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[45] Gov. Br. at 41-43.

[46] *Id.*

[47] Brief for Petitioners *El-Banna et al.* at 13, 26-49.

them. Under the DTA, the Court of Appeals is not allowed to take new evidence, it has no way of knowing what portions of the Government's evidence were obtained through torture and coercion, and the detainees continue to be deprived of the opportunity to confront and rebut the key accusations against them and to introduce evidence establishing their innocence. A standard of review based on the preponderance of the evidence is inadequate in these circumstances where the record is so tainted and one-sided.

Those inadequacies cannot be fixed by any amount of DTA review. They are inherent in the DTA review process itself. Petitioners are clearly not required to exhaust inadequate remedies. *See Marino v. Ragen*, 332 U.S. 561, 570 (1947) (Rutledge, J., concurring).

Significantly, the Government's brief fails even to address these inadequacies. The Government's complete silence regarding the realities of the DTA review process is both remarkable and telling.[48]

Since petitioners filed their opening brief, the inadequacy of the DTA process has become even more apparent. The Government recently disclosed that it has lost or destroyed the materials that the D.C. Circuit ruled are indispensable to the record on review. The D.C. Circuit ruled in *Bismullah v. Gates*,

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[48] Rather, the Government attempts to avoid those issues by arguing that petitioners should "exhaust" the remedies before the Court of Appeals or, alternatively, that the inadequacies in the DTA process are irrelevant because habeas courts would also simply defer to the Government's decisions on who is properly detained.

501 F.3d 178, 192 (D.C. Cir. 2007), that the record on review is the "Government Information" from which the CSRT "Recorders" – that is, the military officers designated to assist the CSRTs – were supposed to select inculpatory and exculpatory evidence about petitioners to present to the CSRTs. As the D.C. Circuit later explained: "Whether the Recorder . . . [presented] all exculpatory Government Information, as required by the DoD Regulations, and whether the preponderance of the evidence supported the conclusion of the Tribunal, cannot be ascertained without consideration of all the Government Information." *Bismullah v. Gates*, _ F.3d _, 2007 WL 2851702, at *1 (D.C. Cir. Oct. 3, 2007).[49]

On September 27, 2007, the Government revealed that "the reality is that there is no readily accessible compilation of the record as defined in *Bismullah* for completed CSRTs," and "it is impossible to recreate with any precision the information that was reviewed by the Recorders in performing their duties." Omnibus Motion to Stay Orders to File Certified Index of Record at 29-30, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. Sept. 27, 2007). In other words, the Government does not have the record the D.C. Circuit considers necessary for review. It has

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[49] Although the D.C. Circuit suggested that the Government could convene new CSRTs whose determinations would be reviewable on the basis of a new and presumably complete record, *Bismullah*, 2007 WL 2851702, at *3, that suggestion would not cure the irretrievable loss to petitioners of exculpatory evidence in the original record and only invites an endless cycle of CSRTs and DTA reviews with no prospect of petitioners' release even if the Government has no factual or legal basis to support their detentions.

been lost or destroyed, or never compiled in the first place. For this independent reason, DTA review in the Court of Appeals would be fruitless.

There is yet another reason why the Government's "exhaustion" argument should be rejected. It is now three and a half years since this Court held in *Rasul* that petitioners are entitled to challenge the legality of their detention by habeas corpus, which is supposed to provide a "swift and imperative remedy in all cases of illegal restraint or confinement." *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 490 (1973). Now, nearly six years into petitioners' incarceration at Guantanamo – what the Government has the audacity to refer to as "this preliminary stage"[50] – it is both erroneous and offensive for the Government to contend that it is premature for this Court to rule on petitioners' claim that Congress unconstitutionally deprived them of their right to habeas.

C. A Habeas Court Would Not Have Deferred to the Executive's Determination, But Would Have Conducted a Plenary Examination into the Legal and Factual Basis for the Detention.

The Government argues, in effect, that the inadequacies in the DTA process do not matter because the petitioners would not have received anything more in habeas; it says that the scope of review in habeas would also have been extraordinarily limited and deferential to the Executive's decision to detain. That is simply wrong.

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[50] Gov. Br. at 11.

In cases of Executive detention imposed without trial, habeas courts traditionally would have conducted a searching review into both the scope of the Executive's legal authority to detain and the factual basis for the detention. Deference to the government's judgments about the scope of its detention powers was entirely unknown in traditional habeas cases.[51] Similarly, habeas courts would not defer to the government's assertions of the facts, but would undertake independent investigation of the facts offered to support detention imposed without trial. *See, e.g., Bollman*, 8 U.S. at 125 (declining to defer to the magistrate's assertion that the facts justified detaining the petitioners, who were suspected of treason, and holding five days of hearings, during which the Court "fully examined and attentively considered" the relevant evidence).

The same was true in the military context. Habeas courts did not shy away from examining the justification for military custody, but traditionally undertook independent fact-finding in a wide variety

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[51] *See, e.g., In re Jung Ah Lung*, 25 F. 141, 143 (D. Cal. 1885) ("to require the court in its investigation to be governed by the decision of an executive officer, acting under instructions from the head of the department in Washington, would be an anomaly wholly without precedent, if not a flagrant absurdity"); *In re Irons*, 13 F. Cas. 98 (C.C.N.D.N.Y. 1863) (refusing to defer to determination of board of enrollment revising petitioner's draft status); *Ex parte Randolph*, 20 F. Cas. 242 (C.C.D. Va. 1833) (taking new evidence and reaching own conclusions notwithstanding executive official's previous fact-finding on same subject).

of circumstances to determine whether petitioners were properly within the custody of the military.[52]

Moreover, the courts consistently held that, absent a valid suspension of the writ, Congress could not make the military's determination of the legality of its custody over someone "final" or "conclusive," and thereby preclude judicial review of the issues.[53]

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[52] *See, e.g., In re Egan*, 8 F. Cas. 367 (C.C.N.D.N.Y. 1866) (ordering release of prisoner because court-martial had lacked the power to try civilian for murder); *McCall's Case*, 15 F. Cas. 1225, 1231 (E.D. Pa. 1863) ("Whether a man is lawfully in military service must always be a judicial question. It is peculiarly a question for decision under a habeas corpus."); *United States ex rel. Turner v. Wright*, 28 F. Cas. 798, 798-99 (C.C.W.D. Pa. 1862) (discharging prisoner alleged to be a deserter after finding his enlistment to have been illegal); *Bamfield v. Abbot*, 2 F. Cas. 577, 577 (D. Mass. 1847) (court could not "doubt that it [was its] duty to inquire into the cause of detention" of enlistee in armed forces); *Ex parte Bennett*, 3 F. Cas. 204 (C.C.D.C. 1825) (examining witnesses anew at habeas corpus hearing); *Shorner's Case*, 22 F. Cas. 8 (D. Pa. 1812) (holding enlistment of minor invalid for lack of parental consent); 12 U.S. Op. Atty. Gen. 258, 266-67 (Oct. 4, 1867) ("[I]t may well be doubted whether such power, conferred upon a merely ministerial officer, can be held to oust judicial inquiry, upon *habeas corpus*, of the legality of the enlistment.").

[53] *United States v. Augenblick*, 393 U.S. 348, 349-50 (1969) (holding that a statute declaring that military review of court-martial convictions is "'final and conclusive' and 'binding upon all . . . courts . . . of the United States'" could not be construed to preclude judicial review through habeas); *In re McDonald*, 16 F. Cas. 33, 35-36 (D. Mass. 1866) ("It is argued for the respondent that the courts have no jurisdiction of this question, because congress has established a sufficient tribunal in the secretary of war, who must be presumed to have exclusive authority," but Congress "could not lawfully do so excepting under the circumstances pointed out by the constitution" for suspending

The Government contends that this Court's decisions in *Yamashita* and *Quirin* support its argument, and that the "type of review available" in those cases "provides the most plausible yardstick" for the review available to petitioners in habeas.[54] But those cases are inapposite; they involved petitions filed to challenge trials by military tribunals where the petitioners were granted all the due process rights the detainees have been denied here – the right to confront and rebut the factual evidence against them, to cross-examine their accusers, to call witnesses and present evidence and to be represented by counsel. In *Yamashita*, the tribunal heard testimony from 286 witnesses who gave over 3,000 pages of testimony.[55] Likewise, in *Quirin*, the tribunal heard extensive evidence from both the prosecution and defense counsel.[56]

Deference to the findings by the military tribunals was appropriate in those cases because the

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habeas.); *Antrim's Case*, 1 F. Cas. 1062, 1067 (E.D. Pa. 1863) (although "a military tribunal may often have occasion to consider" whether a person is under military rule, a law making such a decision final "in such a sense as to preclude altogether judicial cognizance elsewhere of the question . . . would confer a judicial power not warranted by the constitution"); *United States v. Anderson*, 24 F. Cas. 813, 814 (C.C.D. Tenn. 1812) (holding that Congress could not give the military final authority to determine the legality of its custody over military personnel because "Congress could not pass a law vesting the war department with a power which would in effect suspend the writ of habeas corpus").

[54] Gov. Br. at 45.

[55] *See In re Yamashita*, 327 U.S. 1, 5 (1946).

[56] *See Ex Parte Quirin*, 317 U.S. 1, 23 (1942).

petitioners had been afforded the opportunity to litigate the facts – in the words of *Hamdi*, they had been provided "notice of the factual basis [for their detention], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[57]

The petitioners here have been afforded no such opportunity. As the Government now acknowledges, "most of the CSRT conclusions are based in significant part on *classified* information."[58] In other words, petitioners are being detained on the basis of information they are not allowed to know. They have never had the opportunity to confront the key accusations against them and to introduce evidence rebutting those accusations and establishing their innocence. Those rights are essential to any fair hearing, and they are fundamental to the writ of habeas corpus.

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[57] *Hamdi*, 540 U.S. at 533. *See also United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (holding that deference to administrative fact-finding is limited to determinations made "in a judicial capacity" resolving "disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate").

[58] Gov. Br. at 4 (emphasis added).

CONCLUSION

For six years, the Government has had one goal in these cases – to create a place where it can be free from judicial scrutiny and "safe" from the law. In *Rasul*, this Court rejected the Government's attempt to act outside the law at Guantanamo. It made clear that, as an area within the complete jurisdiction and control of the United States, Guantanamo is not "extraterritorial" but within the "territorial jurisdiction" of the United States, and that aliens detained there "no less than American citizens" are entitled to challenge the legality of their detentions under the writ of habeas corpus. Since then, the Government has done everything in its power to avoid this Court's decision and to avoid providing a fair hearing to the detainees at Guantanamo.

Whatever flexibility the military needs to conduct its operations effectively on the battlefield does not require the Executive to be exempted from our laws in safer times and more secure locations. This is such a time, and Guantanamo is such a location. Some six years after they were shipped to a place that is thousands of miles from any battlefield and under the exclusive jurisdiction and control of the United States, these men are entitled to test the legality of their detentions through the Great Writ of habeas corpus. No further delay should be tolerated.

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